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AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.*

"No action shall be brought upon . . . any Agreement that is not to be performed within the space of one year from the making thereof, unlesse," etc., says the English Statute of Frauds.¹ The obvious reason for it was the danger of trusting to the memory of witnesses to oral contracts made so long before their testimony is given; but it must be confessed the language of the statute, under the construction put upon it, does not always prevent the evils sought to be remedied. It has been substantially re-enacted in this country, with an occasional use of the word "promise," instead of, or in addition to, the word "agreement," and also by inserting the words "by its terms" before the phrase "not to be performed;" and sometimes by declaring such contracts "void;" variations which may in part account for some difference of opinion upon apparently similar facts.

It would seem that so simple a statute need not have given rise to much difficulty of construction; but unfortunately it is otherwise, and entire uniformity is by no means yet reached.

In the first place, the very first sentence of the statute, "No action shall be brought," has been quite differently understood.

Some courts, notably Vermont and Ohio, incline to construe those words very literally, and as applying only to a *plaintiff* in a suit to recover on the contract, and not to a defendant setting it up merely by way of defense, or set-off to some other claim by the plaintiff. Accordingly it was held in *Philbrook v. Belknap*,² that in a suit for six months' labor under a *quantum meruit*, the defendant could set up in defense the plaintiff's verbal contract to work for three years, and a

*American Law Review, July-August, 1895. By permission.)

¹ 29 Chas. II., C. 3, Sec. 4, passed in 1676. ² 6 Vt. 333 (1834).

breach thereof in leaving without cause at the end of six months. This was again decided in *Mack v. Bragg*,¹ and in *Abbott v. Inskip*.²

On the other hand, the general opinion is that such a verbal contract is as invalid when set up by a *defendant* as when sued upon by a plaintiff; and that the same objection lies to such verbal contracts whether used for the support of, or in defense to, an action. Any other construction, it has been said, would lose sight of the obvious purpose of the statute, and would be adhering to the letter at the expense of the spirit, clinging to the shadow rather than the substance. Accordingly, *King v. Welcome*³ is directly opposed to *Philbrook v. Belknap*,⁴ although the latter was relied upon by the counsel for the defense. And this view has been sustained in many cases.⁵

The next sentence in the statute, "Upon any agreement not to be performed," etc., has also given rise to much difference of opinion, and the numerous cases thereon may be better understood by an attempt at their classification.

1. And first, as to contracts which are clearly within the statute. The statute includes such contracts, and such only, as either by their express terms, or by a fair and reasonable construction of all their provisions, cannot possibly, under any circumstances whatever, be performed within a year from the making thereof. It does not apply to contracts which can by any possibility be performed in a year, upon any contingency or future event, whether foreseen or unforeseen, whether expressed or implied. It is not sufficient to bring a contract within the statute that, looking backward, such event did not in fact happen within that time; it must be an event which, looking forward, *could* not happen or arrive within a year. It is not enough that both parties did not expect such event to so happen; not enough that it was not likely to happen in the ordinary course of events. If under any circumstances it might happen in a year, consistently with the terms of the contract, the oral contract is sufficient. The statute does not say that contracts which are to be performed within a year need not be in writing, but that contracts which are not to be

¹ 30 Vt. 571 (1858).

² 29 Ohio St. 59 (1875). See also Mr. Hare's note to Peter v. Compton, 1 Sm. Lead. Cas., p. 632 of 8th ed., which seems to favor the same view.

³ 5 Gray, 41 (1855).

⁴ 6 Vt. 383.

⁵ See Comes v. Lamson, 16 Conn. 246 (1844); Scotten v. Brown, 4 Harrington, 324 (1845); Sennett v. Johnson, 10 Pa. St. 395 (1848); Tague v. Haywood, 25 Ind. 427

(1885); Wheeler v. Frankenthall, 78 Ill. 124 (1875); Creighton v. Sanders, 89 Ill. 543 (1878); Bernier v. Cabot Man. Co., 71 Me. 506 (1880); Baker v. Lauterbach, 68 Md. 70 (1887); McGuinnis v. Fernandez, 126 Ill. 228 (1888); Hartwell v. Young, 67 Hun, 472 (1893). See also Carrington v. Roots, 2 M. & W. 248; Reade v. Lamb, 6 Ex. 130, which go even further in holding that such oral contracts cannot be relied upon in any way in a court of justice.

so performed must be in writing. This is well expressed by Judge Cole in *The Blair Town Lot Co. v. Walker*,¹ in these words:

“It is not sufficient to bring a case within the statute that the parties did not contemplate performance within a year, but there must be a negation of the right to perform it within the year. This may be shown by an express stipulation in the contract that it shall not be performed within that time; by an express stipulation to be occupied more than that time in the performance; by a contract, the terms of which cannot, by possibility, be performed within the year; by a contract, the terms of which show, though not in express language, that the party has no right to perform it within the year. Unless a contract comes within one of these classes it is not within the statute.”²

To apply these principles to a few cases. In a contract made in January of one year for improvements upon real estate to be paid for, “a year from the next March,” the promise to pay is plainly within the statute.³ So to marry “at the end of about five years, when I expect to be settled in business;”⁴ to deliver a lot of sheep to the plaintiff at the end of four years;⁵ to take back a horse sold by the defendant to the plaintiff, if he proves to be unsound “after the expiration of a year.”⁶

A verbal letting of a house for more than a year, or for a year from some future day, is, in most states, within the statute,⁷ but a verbal contract “to give a lease for three years,” at the end of six months, is not; for that contract would be performed by merely giving the lease.⁸ A partnership agreement for more than a year is said to be within the statute,⁹ while a contract to take one into a firm might not be, although the partnership was to continue longer than a year; for the contract to admit the partner might be performed immediately.¹⁰ In most of the foregoing cases the postponement of performance beyond

¹ 39 Iowa, 411 (1874).

² See among other cases *W. C. & M. Co. v. Holbrook*, 118 N. Y. 593; *Roberts v. Summit Park Co.*, 72 Hun, 458; *Farwell v. Tilson*, 76 Me. 223; *Durham v. Healt*, 127 Ind. 514.

³ *Lowers v. Winters*, 7 Cow. 263 (1827).

⁴ *Derby v. Phelps*, 2 N. H. 515 (1822); and see *Ullman v. Meyer*, 10 Fed. Rep. 241 (1882).

⁵ *Bartlett v. Wheeler*, 44 Barb. 162 (1864).

⁶ *Shipley v. Patten*, 21 Ind. 168 (1863). And see *Pierce v. Paine*, 28 Vt. 289; *Nicholls v. Nordheimer*, 22 U. C. C. P. 48 (1891).

⁷ *Delano v. Montague*, 4 Cush. 42 (1842); *Schmitz v. Lanperty*, 29 Ind. 400 (1868); *Briar v. Robertson*, 9 Mo. App. 60; *Belter v. Devoll*, 24 Id. 251 (1890). And see *Comstock v. Ward*, 22 Ill. 248 (1839); *Strehl v. D. Ewers*, 66 Ill. 77 (1870).

⁸ *Eaton v. Whitaker*, 18 Conn. 222 (1840).

⁹ *Morris v. Peckham*, 51 Conn. 128 (1883); *Wahl v. Barnum*, 116 N. Y. 87 (1889); *Tomkins v. Randall*, 19 Weekly Rep. 413 (1871); *Wilson v. Ray*, 13 Ind. 1 (1859).

¹⁰ *McKay v. Rutherford*, 13 Jur. 21 (1849), in the Privy Council.

a year arose from the very words of the contract; but the same result may follow from the circumstances of the case and the nature of the act to be done. Thus in *Lockwood v. Barnes*,¹ the defendant agreed to deliver a colt (about to be begotten from his mare), "at the usual time of weaning, or when it was four or six months old." As the stated age of the colt, added to the usual period of gestation, would make fifteen or seventeen months, the contract was held to be within the statute.² So a promise to pay a certain sum if the promisee "did not within three years realize \$1,000 out of the profits" of a certain business, was held to be within the statute, since the true meaning of the contract was that the promisee should have the whole term of three years to ascertain what profits could be made; and performance of the contract by the promisor was therefore to be deferred until the expiration of that time.³ In *Wilson v. Martin*,⁴ the defendant on April 17th, 1839, hired the plaintiff's rooms for a year from the first day of the following May. Held within the statute.⁵ In *Broadwell v. Getman*,⁶ the defendant on January 1, agreed to clear a piece of woodland belonging to the plaintiff, "to be done in one year from the ensuing spring," at which time he was to put in a crop and have the same as compensation for his labor. Held in a suit for not clearing the land that the contract was within the statute.⁷ So a contract made in the spring of one year to raise and deliver a crop of potatoes in the following year is within the statute.⁸ A contract by a railroad company "to establish and maintain a *permanent* turn-out track and stopping place" near the promisee's land, is within the statute.⁹

Again, by the law of Massachusetts a mortgagee of land who has duly foreclosed his mortgage does not acquire a perfect and absolute title until three years afterwards, as the mortgagor has that time in which to redeem. Therefore, when a mortgagee orally promised the mortgagor at the time of foreclosure that if he "should sell the place" for more than the mortgage debt, interest and costs, he would pay the excess to the mortgagor, and eight years afterwards he did sell the place for more than the mortgage debt, etc., it was held he was not

¹ 3 Hill, 128 (1842).

² See also *Groves v. Cook*, 88 Ind. 169 (1882); *Van Dyke v. Clark*, 19 N. Y. Supp. 650 (1892), very similar.

³ *Lapham v. Whipple*, 8 Met. 59 (1844); *Wilson v. Ray*, 13 Ind. 9 (1859), is much like it.

⁴ 1 Denio, 602 (1845).

⁵ See also *Spencer v. Halstead*, Id. 606.

⁶ 2 Denio, 87 (1846).

⁷ *Herrin v. Butters*, 20 Me. 119 (1841), is much like it.

⁸ *Pitkin v. Noyes*, 48 N. H. 244 (1869).

⁹ *Pitkin v. Long Island R. R. Co.*, 2 Barb. Ch. 221 (1847).

liable on such oral promise, as he could not have legally "sold the place" within a year from the time of the promise.¹ In *Patten v. Hicks*² the plaintiff was to cut and deliver at the defendant's saw-mill sufficient logs to keep the mill running for two years, for which the defendant was to pay at the rate of \$5.50 per thousand feet, to be ascertained and measured at the mill, "as fast as so ascertained for said two years." Held that the contract to pay was within the statute, and so the plaintiff could not recover on the contract itself for what logs he did furnish, but resort to a *quantum meruit*. See also *Tiernan v. Granger*,³ where the last payment was to be fourteen months after the contract was made. So a promise to repay borrowed money as soon as it could be made from the profits of nut-bearing trees "yet to be planted" is within the statute.⁴ On similar grounds it was held in *Tierney v. Marshall*⁵ that this contract was within the statute, viz., where, in 1846, B appointed A his agent or bailiff, at a yearly salary of twenty pounds, and in 1851, when one hundred pounds was due A, they orally agreed that A might occupy B's house at an annual rent of seventeen pounds, and that A might deduct his rent annually from the amount due him for his salary. This was on the ground that the parties clearly contemplated more than a year's hiring.

An oral promise, to be valid, must be *wholly performable* in a year. In the examples given above, no part of the defendant's promise was to be performed within a year. But it often happens that part of the promise is clearly performable within a year, and another part clearly not. In such cases the first part does not make the latter part valid, but the latter part makes the former invalid. Thus, if the defendant has bought goods for which he agreed to pay in part within a year, and part after that period, the former provision does not make the latter valid.⁶ On the other hand, the latter part of the contract makes the former invalid. Thus, if A employs B for five years, at stipulated wages, payable quarterly, the fact that four payments are to be made within a year does not make the promise to pay the last sixteen payments binding, but the latter provision makes the former invalid, and no recovery can be had on the contract itself for the first installment of the wages.⁷

2. But we may better understand what contracts are within the

¹ *Frary v. Sterling*, 99 Mass. 461 (1868).

² 43 Calif. 509 (1872).

³ 65 Ill. 354 (1872).

⁴ *Swift v. Swift*, 46 Cal. 266 (1873). And see *Gregory v. Underhill*, 6 Lea, 207 (1880).

⁵ 7 Irish Com. L. R. 308 (1857).

⁶ *Foot v. Emerson*, 19 Vt. 338 (1838); *Parks v. Francis*, 50 Vt. 626 (1878); *Boydell v. Drummond*, 11 East, 155 (1800).

⁷ *Hill v. Hooper*, 1 Gray, 131 (1854).

statute by considering the far more numerous class which are not, and these may be arranged under the various heads.

The first class of cases is where no term of years is alluded to, but the time of performance is either wholly indefinite, or depends upon some future contingency or event which may or may not happen within a year. Here, although such event does not occur until a year, the promise is clearly not within the statute. Looking backward, indeed, it seems as if little reason ever existed for thinking otherwise, but the point has been raised and discussed in many different courts. Indeed, in the very first reported case, the defendant had orally promised to pay a stated sum "upon the return of a certain ship," but which did not return within two years. At Easter term, 1694, the Common Bench held the case was not within the statute, since the ship might have arrived in a year.¹ At the following Trinity term of the same year the King's Bench applied the same rule to a promise to pay "upon the marriage of the promisee," although that did not take place for two years.² And the same question has been rolling through the courts ever since, with generally the same result. Thus to marry "after my return from a certain voyage," although it was expected to be about eighteen months;³ or "when I get well;"⁴ to marry "at the end of a year's engagement."⁵ So, to marry "in or within three years,"⁶ or "within four years."⁷ A contract allowing another to cut and carry away a lot of trees "at any time within ten years" need not be in writing, as they might have been taken away in one year, although in fact they were not.⁸ To build a road "within a year, and twenty days for emergencies."⁹ So of a contract made in October to build a house "before the close of the next year."¹⁰ So to erect four buildings, three in 1883 and one "during the season of 1884," made in June, 1883.¹¹ So of a contract to lease land "for the crop season of 1880," made in January of that year.¹² A promise to repay another any sum which he may be called upon to pay as surety on a bond, since the bond may become forfeited and the surety held to pay

¹ Anon. 1 Salk. 280.

² Peter v. Compton, Skin. 353; 1 Sm. Lead. Cas. 351.

³ Clark v. Pendleton, 20 Conn. 495 (1850).

⁴ McConahey v. Griffey, 82 Iowa. 564 (1891).

⁵ Smith v. Jamieson, 17 Ont. R. 626 (1889).

⁶ Paris v. Strong, 51 Ind. 341 (1875).

⁷ Lawrence v. Cook, 56 Me. 187 (1868).

⁸ Kent v. Kent, 18 Pick. 569 (1836). See also Gault v. Brown, 48 N. H. 183 (1868). Nearer the line. Hamilton v. MacDonnell, 6 U. C. Q. B. (o. s.) 722 (1838).

⁹ Jones v. Pouch, 41 Ohio St. (1884).

¹⁰ Plimpton v. Curtis, 15 Wend. 336 (1836).

¹¹ Sarles v. Sharlow, 5 Dak. 10 (1888).

¹² Chaffee v. Bonoit, 81 Miss. 34 (1882).

within a year from the promise, though in fact he is not until some time after.¹

An agreement to pay a sum when the promisor should sell certain land is not within the statute, since the land might have been sold in a year, although in fact more than two elapsed before the sale.²

A contract to sell a right to subscribe for stock in a corporation "when the same may be issued and opened for subscription upon the books of the corporation" is not within the statute, although more than two years elapsed before the books were opened;³ or to pay for stock in a corporation when the company may be organized;⁴ to pay when the promisor has collected a certain debt due him, but which is not payable until after a year, as it might possibly be collected by anticipation within a year;⁵ to pay \$650 "as soon as it can be earned on a tract of land of eighty acres;"⁶ to pay at the end of a certain lawsuit;⁷ to pay at the death of the promisor, or of some other person;⁸ or to leave property to another at the promisor's death.⁹ In *Morse v. Fox*,¹⁰ the defendant orally promised to pay the plaintiff "two dollars a year for his services, as minister, and had paid two dollars a year, in half-yearly payments, until the last two years, for which the action was brought." The promise was held valid, since it did not appear that he agreed to pay for any particular number of years, and therefore it might possibly be performed in a year.¹¹

Of course the statute does not apply to a contract to marry, without stating any time. The law implies it is to be performed in a reasonable time, and although more than a year had elapsed before any action was brought, the promise would not be invalid because oral.¹² So, if

¹ *Blake v. Cole*, 22 Pick. 97 (1839).

² *Linscott v. McIntire*, 15 Me. 201 (1836); *Parker v. Siple*, 76 Ind. 350 (1881); *McPherson v. Cox*, 96 U. S. R. 404 (1877); *Doe v. Walters*, 16 Ala. 716 (1849); *Bartlett v. Mystic River Corporation*, 151 Mass. 453 (1890). And see *Walker v. Johnson*, 96 U. S. R. 427.

³ *Golden v. Lance*, 1 McMullen, Eq. 87 (1841).

⁴ *Walker v. Railroad Co.*, 26 So. Car. 80 (1886).

⁵ *Artcher v. Zeh*, 5 Hill, 200 (1843).

⁶ *Sutphen v. Sutphen*, 30 Kans. 510 (1883).

⁷ *Heflin v. Milton*, 69 Ala. 354 (1881); *Gonzales v. Chartier*, 63 Texas, 36 (1886).

⁸ *Wells v. Horton*, 4 Bing. 40 (1826); *Sword v. Keith*, 31 Mich. 247 (1875); *Riddle*

v. Barnes, 38 Iowa, 81 (1874); *King v. Hanna*, 9 B. Monr. 269 (1849); *Kent v. Kent*, 60 N. Y. 500 (1875); *Udike v. Ten Broeck*, 32 N. J. L. 105 (1866).

⁹ *Fenton v. Emblers*, 3 Burr. 1278 (1762), the leading case on this point; *Thomas v. Armstrong*, 86 Va. 332 (1889); *Adams v. Adams*, 26 Ala. 272 (1855); *Ridley v. Ridley*, 34 Beav. 478 (1865), where the death was fourteen years after the promise; *Bell v. Hewitt*, 24 Ind. 280; *Jilson v. Gilbert*, 26 Wis. 637 (1870); *Frost v. Taber*, 53 Ind. 300 (1876).

¹⁰ 10 Johns. 244 (1813).

¹¹ See farther *Alderman v. Chester*, 34 Ga. 159 (1865).

¹² *Blackburn v. Mann*, 85 Ill. 222 (1877). And see *Nichols v. Weaver*, 7 Kans. 373.

the original contract is to be performed within a year, extensions of it from time to time, by parol, for periods less than a year, would not be affected by the statute.¹

3. The same general principles apply to promises *to continue to pay or to do something* until some future event or contingency, either distinctly expressed or necessarily implied, shall occur. If this may happen within a year the promise need not be in writing.

Thus, a promise to support a child "so long as I think proper;"² a contract by an actress to aid in performing a play "so long as it continues to be a success;"³ to pay the plaintiff three hundred pounds a year "so long as she should maintain and educate children properly;"⁴ to employ a person "so long as he may be disabled" by an injury.⁵ So, a contract by a railroad company to maintain cattle-guards on a person's land "so long as the railroad is operated over it."⁶ The same may be said of a landowner's promise to maintain a fence on his land, along the railroad line, no time being mentioned, but it being fairly to be implied as continuing only so long as the railroad was maintained.⁷ In *Warner v. Texas & Pacific R. R. Co.*⁸ it was thought that a contract to build and maintain a switch "as long as the plaintiff needed it," was, under the peculiar circumstances, within the statute. *Sed quare.*

Contracts to support another indefinitely, or "for life," or "so long as he lives," fall under this head. The leading case in Great Britain on this point seems to be *Murphy v. O'Sullivan*,⁹ where the subject is carefully considered. This is reported under the name of *O'Sullivan v. Murphy*.¹⁰ The case was approved and followed in *McGregor v. McGregor*,¹¹ where the immediate case of *Davey v. Shannon*,¹² was distinctly disapproved.¹³ The same rule had been applied in Kentucky thirty years before Murphy's case, viz., in *Howard v. Burgon*,¹⁴ which has been followed by a long line of decisions, which puts the question

¹ *Donovan v. Richmond*, 61 Mich. 467 (1896).

² *Souch v. Strawbridge*, 2 C. B. 808 (1846).

³ *Haines v. Thompson*, 19 N. Y. Supp. 184 (1892).

⁴ *Knowlman v. Bluett*, L. R. 9 Ex. 1 and 309 (1873).

⁵ *East Tennessee &c. R. R. Co. v. Staub*, 7 Lea, 397 (18—).

⁶ *Arkansas M. R. Co. v. Whitby*, 54 Ark. 199 (1891). See also *Sweet v. Desha Lumber Co.*, 56 Id. 629 (1892).

⁷ *Talmage v. Rensselaer v. Saratoga R. Co.*, 13 Barb. 493 (1852), which, however, was placed on another ground.

⁸ 54 Fed. Rep. 922 (1893).

⁹ 11 Irish Jur. (N. s.) 111 (1866).

¹⁰ 14 Weekly Rep. 407.

¹¹ 21 Q. B. Div. 424 (1888).

¹² 4 Ex. Div. 81.

¹³ See also *Slater v. Smith*, 10 U. C. Q. B. 630.

¹⁴ 4 Dana, 137 (1836).

at rest in this country at least.¹ So, a contract to give a railroad pass annually to another for his life is not within the statute.² To let an estate for the life of the lessor is similar.³

4. So, a contract *not to do something*, as never to carry on some particular business, need not be in writing; "since being a personal engagement it stipulates nothing beyond the promisor's life, and imposes no duties upon his legal representatives. The fact of abstaining from the business of the promisor until his death would be a full performance of the contract, and that event might occur within a year:" This view has been acted upon in many cases.⁴

5. Another class of cases are those in which the contract states a certain number of years as the extreme limit of its continuance, and also expressly contains an alternative, or contingency on which it may sooner terminate. If this contingency may happen within a year the contract is not within the statute.

Thus, a contract to support a child "five or six years *or* as long as it should be chargeable to the town" need not be in writing.⁵ So, to work for a company "for the term of five years, *or* so long as L. shall continue to be agent of the company;" since the legal effect of such a contract is to work so long as L. is agent, not exceeding five years.⁶ To print the plaintiff's calicoes "for two years or longer if necessary, until he has made \$50,000 profits." To sell stock "at the end of three years at 96. Stock may be called at 96 at any time before expiration of three years."⁷

This view may not always have been strictly observed. Thus a con-

¹ Bull v. McCrea, 8 B. Monr. 423 (1848); Stowers v. Willes, 83 Ky. 544 (1886); Elliott v. Peterson, 4 Md. 476 (1853); Hutchinson v. Hutchinson, 46 Me. 154 (1858); Burney v. Ball, 21 Ga. 505 (1858); Wiggins v. Keizer, 6 Ind. 232 (1855); Houghton v. Houghton, 14 Ind. 507 (1860); Draper v. Draper, 35 Barb. 573 (1862); Thorp. v. Stewart, 44 Hun, 232 (1887); Heath v. Heath, 31 Wisc. 223 (1872); Harper v. Harper, 57 Ind. 347 (1877). Deaton v. Tenn. Coal & R. R. Co., 12 Heisk. 650 (1874), sometimes cited to the contrary, rests upon the peculiar language of the contract in that case. Goodrich v. Johnson, 66 Ind. 258 (1879), seems to be inconsistent with other decisions in the same State.

² Atchinson & C. R. B. Co. v. English, 38 Kans. 110 (1887).

³ McConnell v. Drummond, 9 Neb. 388 (1879).

⁴ Lyon v. King, 11 Met. 411 (1846), where the words were "noth^r hereafter" etc. Foster v. McO'Blennis, 18 Mo. 88 (1853); and see 26 Mo. 225; Blanding v. Sargent, 33 N. H. 239 (1856), "not thereafter;" Worthy v. Jones, 11 Gray, 168 (1858), where the time is not stated; Blanchard v. Weeks, 34 Vt. 589 (1861), "forever;" Richardson v. Pierce, 7 R. I. 330 (1862), "not henceforth;" Dougherty v. Rosenberg, 62 Cal. 32 (1882), "altogether to forbear;" Welz v. Rhodins, 87 Ind. 12 (1882).

⁵ M'Lees v. Hale, 10 Wend. 426 (1833).

⁶ Roberts v. The Rock Bottom Company, 7 Met. 46 (1843).

⁷ Hodges v. Richmond Manufacturing Company, 9 R. I. 482 (1870).

⁸ Seddon v. Rosenbaum, 85 Va. 928 (1889).

tract to carry the U. S. mail for four years was held within the statute, although the postmaster-general might under a power reserved in the contract possibly put an end to it within a year.¹

In *Saunders v. Kastenbine*,² a contract to sell a slave for \$400, payable in monthly installments of not over \$8 per month, "unless the buyer should find it convenient to pay more," was thought to be within the statute, although the case was really decided upon the ground that the contract as proved was an *agreement to sell* when paid for and not until then.

6. The next class of cases is not quite so clear, viz., contracts expressed to continue for a term of years, but which might terminate by the death of some party within that time. Such are contracts to support or educate a person for a number of years or "until he is twenty-one," that being for more than a year. Here the preponderance of opinion is that as such contracts would be practically accomplished at the death of the party to be supported, they are not within the statute. *Peters v. Westborough*³ is probably the leading case in this class. There the agreement was to support a person, then eleven or twelve years old, "until she was eighteen years of age." She lived a little over a year; but it was held that the oral agreement was valid, for "if she had died within a year after the making of the agreement it would have been fully performed." Mr. Browne, in his valuable treatise on the Statute of Frauds, in his note to sec. 282a, says this case "appears not to be law;" but it has been adopted and followed in other cases.⁴

Under this head may be classed contracts not to carry on some particular business for a *given number of years*; to which the same rule has been applied as to contracts *never* to carry it on. It is difficult to distinguish between them. *Doyle v. Dixon*⁵ is the leading case on this point, in which Mr. Justice Gray says, "whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life."⁶

A different view was taken, though apparently without much dis-

¹ *Harris v. Porter*, 2 Harrington, 27 (1835).

² 6 B. Monr. 17 (1845).

³ 19 Pick. 364 (1837).

⁴ See *McKinney v. McKinney*, 8 Daly, 363; 78 N. Y. 594 (1878); *Woodridge v.*

Stearn, 42 Fed. Rep. 311 (1890); *White v. Murtland*, 71 Ill. 266 (1874).

⁵ 97 Mass. 208 (1867).

⁶ See also *Perkins v. Clay*, 54 N. H. 118 (1874), where the restriction was for two years; *Washburn v. Dosch*, 68 Wisc. 436 (1887).

cussion, in *Gottschalk v. Witter*¹ and *Self v. Cordell*.² In the latter case, however, the contract was held *valid*, because the defendant had received the full consideration from the plaintiff.

7. Still another class are contracts which *prima facie* clearly extend beyond a year, but which allow either party to terminate them *by notice within a year*. Here also there is much conflict of opinion. Some courts hold such contracts within the statute, on the ground that if terminated by such notice they are not "performed;" but rather that non-performance is justified or excused by the notice. In *Burch v. Earl of Liverpool*³ a contract to hire the plaintiff's carriage for five years, at ninety guineas a year, was held within the statute, although a custom existed by which the hiring might be determined at any time by the defendant upon his paying one year's hire as a consideration therefor. And this was followed and approved in *Roberts v. Tucker*.⁴ Again, in *Dobson v. Collins*,⁵ the defendants agreed to employ the plaintiff for a year from a future day, and the plaintiff agreed to serve that time, "unless said employment were determined by three months' notice from him to the defendant." He was dismissed before the year had fully expired, and it was held that this provision about determining the contract did not take the case out of the statute.⁶

The English courts, or some of them, seem to put a strict and literal construction upon the word "performed," and do not admit that any termination of the original contract by any event, even though stipulated for, such as by notice, misconduct, death, etc., will save a contract from the statute, if otherwise it would be within it. Indeed it seems to have been held in England that a promise to pay one an annuity, for his life, is within the statute, although payment would wholly cease at his death.⁷ It is on this ground that a contract to support a five-year-old child "until she was able to support herself" was held to be within the statute in *Farrington v. Donohoe*,⁸ notwithstanding her death might occur within a year; so of a contract never to practice one's trade, although death within a year would release the promisor from all obligations, and accomplish the full purpose of the contract.⁹

¹ 25 Ohio St. 76 (1874).

² 45 Mo. 345 (1870).

³ 4 Man. & Ry. 380 (not so well reported in 9 B. & C. 392).

⁴ 3 Ex. 643 (1849).

⁵ 1 H. & N. (1856).

⁶ See also *Davey v. Shannon*, 4 Ex. Div. 85; *Eley v. Positive Assurance Co.*,

1 Ex. Div. 20 (1875); *Acraman, Ex parte*, 4 De Gex, F. & J. 541 (1862); *Booth v. Prittle*, 6 Ont. App. 687 (1881); *Meyer v. Roberts*, 46 Ark. 80 (1885).

⁷ *Swett v. Lee*, 3 Man. & G. 452; 4 Scott N. R. 77 (1841).

⁸ Ir. Rep. 1 C. L. 679 (1866).

⁹ *Davey v. Shannon*, 4 Ex. Div. 81.

The English doctrine, as laid down in *Burch v. Liverpool* and *Dobson v. Collis*, was approved and followed by the Supreme Court of the United States in *Packet Co. v. Sickles*,¹ where it was held that a contract by the owner of a steamboat to pay a weekly sum for the use of a patent during the continuance of the patent, about twelve years, "if the boat should last that long," was within the statute; but this certainly seems contrary to the general current of American authorities.² So in *Holloway v. Hampton*³ a contract to take and pay for a crop of hemp then on hand, and also the crop "to be raised the two succeeding years," was held to be within the statute as to the second year's crop, although the contract provided that the agreement should "cease on the death of either party." *Sed quare*. But looking at the subject only upon principle, if a contract contains such a clause as in *Dobson v. Collis*, how does it differ from a contract to work for five years "unless I give you notice to the contrary," or "for five years, or so long as we can agree;" yet no doubt such contracts are not within the statute.⁴

Again, all agree that if a contract for service is originally for an indefinite time, it need not be in writing. But if the contract contains a provision by which the duration may terminate at any time, why should not the same rule apply? Is not the duration of the contract as much indefinite—inherently as indefinite—in the latter case as in the former? If "indefinite" means doubtful, uncertain, dependent on circumstances, are not both contracts equally so? If an oral partnership agreement for a term of five years provides that it shall terminate at any time, at the notice of either partner, is that contract within the statute? How does it differ from a partnership "at will?"⁵ New York has more than once laid down a rule at variance with that of *Dobson v. Collis*. Thus in *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*⁶ the defendant company during the continuance of a policy on a church orally agreed with the plaintiffs that until notice to the contrary should be given by one party to the other the defendants should renew the policy from year to year, without further notice, and should give the plaintiffs a certificate of renewal or payment of the premium, and that such certificates were given for two years after such oral agreement. The church was burned during the year covered by

¹ 5 Wall. 580 (1866).

² See *Somerby v. Buntin*, 118 Mass. 286.

³ 4 B. Monr. 415 (1844).

⁴ See *Greene v. Harris*, 10 R. I. 401 (1870).

⁵ See *Smith v. Tarleton*, 2 Barb. Ch. 336 (1847).

⁶ 19 N. Y. 305 (1859).

the last certificate. The court held the oral contract to renew not invalid at common law, and not under the statute of frauds, saying, "It is not the meaning of the statute that the contract must be performed within a year. An agreement which either party can terminate at any time by a notice to the other may be binding so long as the notice is not given, but it is not within the language or policy of the statute."¹ In *Blake v. Voight*² the defendant on November 27th agreed to pay plaintiff a commission on all goods the plaintiff could send them for sale "for one year from December 1st, either party having the right to terminate it by notice in June following." This option was exercised by the defendant in June, and it was held that this option saved the contract from the operation of the statute.³

8. As to contracts for personal service. Clearly a contract to employ one "for a reasonable time," or "from month to month," is not within the statute, though the employment in fact extends through several years before any controversy arises.⁴ So a contract for a year's service, with no allusion for the time of commencing, or where no circumstances indicate that it may not commence immediately, is not within the statute;⁵ still more if the service is to commence "immediately."⁶ So of a contract for a year to commence the very next day.⁷

But a contract for a year to commence on *some future day*, beyond the next, has always been held within the statute;⁸ even though the only intervening day between the contract and the commencement of the service be Sunday.⁹

¹ See also 28 N. Y. 163; 62 N. Y. 564.

² 134 N. Y. 69 (1892).

³ See also *Smith v. Coulin*, 19 Hun, 234 (1879); *Sherman v. Champlain Transportation Company*, 31 Vt. 162 (1858).

⁴ *Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590 (1881); *Kilne v. Shaeffing*, 33 Neb. 22 (1891).

⁵ *Russell v. Slade*, 12 Conn. 445 (1838); *Aiken v. Nogle*, 47 Kans. 96 (1891); *Cole v. Singlerly*, 60 Md. 348 (1888).

⁶ *McAllen v. Cooning*, 18 Jones & Spencer, 63 (1884).

⁷ *Dicta* in *Cawthorne v. Cordey*, 13 C. B. (N. S.) 406 (1863); and in *Britain v. Rossiter*, 11 Q. B. Div. 123 (1879); and directly decided in *Dickson v. Frisbee*, 52 Ala. 165 (1875); *Levison v. Stix*, 10 Daly (1881), and *Billington v. Cahill*, 51 Hun, 132 (1889), 20 N. Y. St. Rep. 615, are contrary to this view.

⁸ *Bracegirdle v. Heald*, 1 B. & Ald. 727

(1818), the leading case on this point. *Hinckley v. Southgate*, 11 Vt. 428 (1839); *Dickson v. Jacques*, 31 U. C. Q. B. 141 (1871); *Whipple v. Squire*, 1 Vt. 69 (1826); *Emery v. Smith*, 48 N. H. (1865); *Nones v. Homer*, 2 Hilt. 116 (1858); *Harper v. Davis*, 45 U. C. Q. B. 442 (1880); *Oddy v. James*, 48 N. Y. 685 (1872); *Hearne v. Chadbourne*, 65 Me. 302 (1876); *Lee v. Hill*, 87 Va. 497 (1891); *Snelling v. Ld. Huntingfield*, 4 Tyr. 606; 1 Cr. M. & R. 20 (1834); *Amberger v. Marion*, 4 E. D. Smith, 393 (1855); *McElroy v. Ludlum*, 32 N. J. Eq. 828 (1880); *Shumate v. Farlow*, 125 Ind. 359 (1890); *Haynes v. Mason*, 30 Ill. App. 85 (1888); *Kelly v. Ferrill*, 26 Ga. 551 (1851); *Turnow v. Hochstader*, 7 Hun, 80 (1896); *Kleeman v. Collins*, 9 Bush, 460 (1872); *Blanck v. Sietell*, 9 Daly, 268 (1880).

⁹ *Britain v. Rossiter*, 11 Q. B. Div. 123 (1879).

Whether the year is to commence from the time of making the contract or from some future day may be sometimes gathered from the circumstances of the case when no time is expressly stated. Thus, in *Sutcliffe v. Atlantic Mills*,¹ the plaintiff at the time of making the contract said "he could not come now, but would come as soon as he could," but he did not in fact come until seven days afterwards; it was held the year commenced from the day he came, and therefore the contract was within the statute. In *Collins v. Botthamley*² the defendant orally agreed to serve the plaintiff for a year from a future day, and also that after the year the services should continue "thenceforth until the parties should determine the same by three months' notice." After several years' service the defendant left without giving three months' notice, and the plaintiff was allowed to recover for this breach, inasmuch as a new contract arose at the end of the first year, which was for no stated time, and therefore there was no need of any writing.³ So contracts to work for several years have often been held within the statute whether the service was to commence at a future day or immediately.⁴

Considering the number and uniformity of the decisions against the validity of oral contracts for more than a year's service it may perhaps be considered no longer an open question; but were the matter *res integra*, is there not room for arguing that the same rule should apply as to other personal contracts for a term of years, and that the same effect should be given to death in the one case as in the other? If a contract to support a person for five years need not be in writing because at such person's death within a year the contract would terminate, and therefore be practically performed, as has been often held, why is not a contract to work for him for that period in the same category; since a contract is terminated by the death of the promisee in this case as in the other.⁵ Is not a valet's contract to serve his master for several years "performed" when the master dies? What more can the servant do to perform it? Again, if a promise to refrain from carrying on a rival business for several years is legally "performed" by the death of the promisor within a year, as is well settled, why is

¹ 13 R. I. 490.

² Weekly Rep. 87 (1858).

³ And see *Dale v. McCullough*, 9 Viet. L. R. 136 (1883).

⁴ *Shute v. Dorr*, 5 Wend. 204 (1830); *Drummond v. Burrell*, 13 Wend. 308 (1835); *Pitcher v. Wilson*, 5 Mo. 46 (1837); *Giraux*

v. Richmond, 2 C. B. 835 (1846); *Jones v. Rey*, 52 Barb. 501 (1868); *Hill v. Hooper*, 1 Gray, 131 (1854); *Tuttle v. Sweet*, 31 Me. 555 (1850); *William Butchers' Steel Works v. Atkinson*, 68 Ill. 421 (1873); *Barrett v. Riley*, 42 Ill. App. 258 (1891).

⁵ *Harrison v. Conlan*, 10 Allen 85 (1865).

not a promise to serve him for that time equally so? If a contract not to work *against* another in his business for five years is legally performed by the promisor's death within a year, why is not a contract to work *for* him in his business just as much so? Why may not the contract of service be considered as made upon the implied condition understood by both parties, "if I live so long;" and why should not such implied and mutually understood condition have the same effect as if distinctly expressed in the contract itself? Does not the question turn largely upon the construction to be given to the word "performed?" If the phrase "to perform" necessarily and always means to carry out, to bring to completion, to fully carry through from start to finish, then a contract to do a certain thing for a period of five years cannot be performed in less time under any circumstances; but if on the other hand "to perform" may as well mean to accomplish, to fulfill, to discharge, to do all one is bound to do under the contract, then a contract for years may be performed in one year, if the death of either party within that time terminates all liability under the contract.

In *Hill v. Jamison*¹ it appears to have been held that a contract for personal service for a term of years is not within the statute, since the death of the promisor within a year would perform it. See also *Wilhelm v. Hardman*,² where a contract to serve seven years was held not within the statute.

In *Pennsylvania Co. v. Dolan*³ it is said to have been "frequently decided that when a contract is personal in its character, as a contract for personal services, which might terminate with the death of the party making it, though the contract be for an indefinite period or a term of years, it is not within the statute." But the cases cited do not appear to fully sustain that exact statement.

Shute v. Dorr,⁴ often cited against the validity of oral contracts for long service, does not necessarily decide it. In the first place by the contract the defendant was not to pay for the work until the end of five years, and that alone would make his promise within the statute. In the next place, the contract provided that the plaintiff might quit, "if the parties disagreed," and after three years' service the parties did disagree, and the plaintiff did "quit," and brought his action for three years' labor, not on the contract itself, but on a *quantum meruit*. As he had a right to leave without fulfilling the original contract, he

¹ 16 Ind. 125 (1861).

² 13 Md. 140 (1858).

³ 32 N. E. Rep. 802 (Ind. 1892).

⁴ 5 Wend. 201.

had a right to recover for his labor actually performed, whether the contract would or would not have been otherwise valid for the whole term. So in *Hill v. Hooper*,¹ a suit against the employer, where the last payment for five years' service was not to be made until the end of the five years, and of course that circumstance made the whole contract for even earlier payments invalid, so that no recovery for such earlier payments could be had on the special contract, whether they could or could not have been recovered on a count for a *quantum meruit*.

As a matter of principle and analogy, it seems worthy of consideration whether a contract for one's personal service to another in person, though for more than a year, might not originally have been held not within the statute. So far as the writer's research extends, no case has been found in which the effect of the death of the *promisee* in such a case had been decided or even considered.

9. As to the effect of performance; in whole or in part.

1. Total on both sides. 2. Total on plaintiff's side. 3. Partial on defendant's side.

1. All agree that where an oral contract has been fully performed *on both sides*, the statute has no application. The contract has passed beyond the reach of the statute.

Therefore, where A orally agreed to work for seven years for the defendant, for a stipulated compensation, which was fair and reasonable in itself, and *had been fully paid and received by him*, it was held he could not afterwards set aside the contract merely because it was oral, and recover more compensation on a *quantum meruit*, even though he could show that his services were worth more than the agreed consideration.²

2. If wholly performed by the plaintiff only.

What effect has a plaintiff's performance of his side of the contract, within a year, upon the promise of the defendant?

In 1832 the King's Bench of England advanced a very important doctrine on this point, which has been much criticised on both sides of the Atlantic, viz., that if the plaintiff's part of the contract be performable within a year, and *a fortiori*, if in fact it be so performed, the defendant's promise is thereby made valid, even though itself clearly not to be performed within a year, or even within many years.

This doctrine was placed in part upon the supposition that the word

¹ 1 Gray, 131 (1854).

² *Stone v. Dennison*, 13 Pick. 1 (1832).

“agreement” in the English statute, *ex vi termini*, means the obligation of *both parties*, and therefore unless both of the obligations are not performable within a year, it cannot be said that the agreement—the whole agreement—is within the statute.

In part also it rests upon the ground that if the contract be actually performed by the plaintiff and the defendant has received the full benefit thereof, he ought to pay for it.

*Donellan v. Read*¹ seems to be the first actual decision on this point, though intimations of the same doctrine had previously appeared. There a tenant, already in possession, orally agreed to pay his landlord an increased rent of five pounds a year for fifteen years, in consideration of certain improvements to be made by the landlord upon the leased premises. The improvements having been made, the landlord brought suit for the first five pounds, both upon the special contract itself, and on the general counts, and he was allowed to recover, apparently upon the special contract, as no stress was placed upon the general counts.²

Some of our own courts have approved and followed *Donnellan v. Read*, although in many of them, as in that case, there was, beside the declaration on the special contract, a general count on a *quantum meruit*, or *quantum valebant*, or for money paid, on which the actual decision might safely rest, notwithstanding the invalidity of the contract itself.

This question seems to have first arisen in Maine in *Holbrook v. Armstrong*,³ a case of a sale and delivery of personal property with an oral promise to pay at the end of two years. Although the court favored the view that performance by the seller might take the case out of the statute, yet, if not so, he could recover on the general counts for goods sold and delivered which formed a part of the declaration. The same effect has often been given to the plaintiff's performance, allowing him to recover the agreed price, *if to be paid in money*, whether there was or was not any other count than on the special contract itself.⁴

¹ 3 B. & Ad. 809 (1832).

² This decision was subsequently approved by different judges in *Souch v. Strawbridge*, 2 C. B. 808; *Cheney v. Hemming*, 4 Ex. 631; *Smith v. Neale*, 2 C. B. (N. S.) 67; *Miles v. New Zealand Co.*, 32 Ch. Div. 276; *Christie v. Dowker*, 10 Grant, 202 (1863); *Christie v. Clark*, 16 U. C. C. P. 552 (1866); *Bennett v. Peck*, 2 Pugsley, 322 (1874), in Nova Scotia.

³ 10 Me. 31 (1833).

⁴ This rule was adopted in *Alabama*, *Rake v. Pope*, 7 Ala. 161 (1844); *Georgia*, *Johnson v. Watson*, 1 Kelly, 348 (1846); *Illinois*, *Curtis v. Sage*, 35 Ill. 22 (1864); *Iowa*, *Smalley v. Greene*, 52 Iowa, 244 (1879); *Indiana*, *Wolke v. Fleming*, 103 Ind. 110 (1885), citing 14 Ind. 505; 20 Ind. 24; 24 Ind. 416; 89 Ind. 426; and see 121 Ind. 407; *Kentucky*, *Dant v. Head*, 90 Ky.

Notwithstanding these numerous decisions, is not the reason and the principle on the other side?

As to the doctrine that the defendant's promise, though to be performed after a year, is made valid if the *plaintiff's* promise is to be performed within that time, on the ground that the word agreement necessarily implies the promises of both, is not the word "agreement" used in the sense of promise, assurance, undertaking, the obligation of the party sued? If "agreement" means the promises of *both* parties, how can any one bring a suit on any agreement? He cannot sue on his own promise, and, if his promise is half of the agreement, he must bring his action on half of an agreement. It is sometimes said that the word agreement necessarily implies two parties. So does the word promise or obligation, yet, had the English statute used the word "promise" instead of "agreement," could there be any doubt about the construction? The fact that an "agreement," to be binding, need be signed only by the *defendant* tends to show that the word agreement refers only to *his* undertaking, and not to that of the plaintiff also; for, as pointed out in the note to *Peter v. Compton*, it is clear that the word "agreement" in the English statute is used in the sense of the defendant's promise in that part of the statute relating to the signature. Has the word two meanings in the same clause?

The necessary result of construing the word agreement to mean only the promise of the *defendant* is that the Statute of Frauds may apply to one party to a contract, but not to the other. If the party whose promise was not to be performed in a year is the defendant the statute is a defense; on the other hand, if the other party whose promise was to be performed in a year be the party sued, the statute does not apply. This was directly decided in *Sheehy's case*.¹ This, of course, destroys the mutuality of the contract, but such would be the case if the promise of one party was written, and that of the other only oral, in which case one is always bound and the other not.

Now, as to the doctrine of *performance by the plaintiff*. The statute does not contain any such provision or give any such effect to perform-

255 (1890); *Maryland*, *Horner v. Frazier*, 65 Md. (1885), citing 4 Md. 488; *Mississippi*, *Duff v. Snider*, 54 Miss., 245 (1876); *Missouri*, *Winters v. Cherry*, 78 Mo. 351 (1883), and cases cited; *New Jersey*, *Berry v. Doremus*, 30 N. J. L. 403 (1863); *Rhode Island*, *Durfee v. O'Brien*, 16 R. I. 215 (1888), citing the cases on both sides; *South*

Carolina, *Bates v. Moore*, 2 Bailey, 614 (1832); *Thompson v. Gordon*, 3 Strob. 196 (1848); *Compton v. Martin*, 5 Rich. L. 14 (1851); *Walker v. Railroad Co.*, 26 S. C. 81 (1886); *Virginia*, *Seddon v. Rosenbaum*, 85 Va. 928 (1889); *Wisconsin*, *Grace v. Lynch*, 80 Wis. 166 (1891), citing earlier cases.

¹ 41 Vt. 541 (1869).

ance. It says, "No action shall be brought upon *any* agreement not to be performed," etc. To ingraft such a clause upon the statute is doing violence to its plain intent. The danger of proving the defendant's promise by oral testimony is just as great, although the plaintiff has performed his part of the agreement as if he had not. The fact that the same statute *expressly* provides that part performance, etc., will take a sale of personal property above ten pounds, out of the operation of the statute, tends to show it was not intended it should have the effect in other contracts where it was not mentioned. *Non apparent non existant*.

True, the statute makes no express provision that performance will take an oral contract for the *sale of land* out of the statute; but the doctrine that it may sometimes do so is wholly an equitable doctrine, administered only in a court of equity; and in a suit *at law* on the oral promise to convey, no damages could be recovered for a breach to convey, merely because the plaintiff had paid part or even the whole of the purchase money;¹ though, doubtless, the money actually paid could be recovered back after a refusal to convey.²

In *Broadwell v. Getman*³ the doctrine of *Donnellan v. Read* was disapproved by Beardsley, J., as being in his opinion "a plain violation of the statute," though the point was not exactly involved in the decision, since the plaintiff in that case was not to perform all the stipulations on his part within a year.

In *Thomas v. Dickinson*⁴ it was declared that full performance by the plaintiff and also partial performance by the defendant will not take a case out of the statute as to the part that remains to be done, though this was a case of a sale of land.⁵

*Marcy v. Marcy*⁶ is one of the most important cases in America on this point. There the plaintiff's father had conveyed a farm to the defendant, who then orally promised to pay the plaintiff \$500, when he became of age, which was about three years after the promise. At that time the plaintiff brought his action solely upon the oral promise, and it was held he could not recover.

Apparently, by the law of Massachusetts, the case might have been decided against the plaintiff on the ground that he was neither a party to the consideration, nor to the promise, but the decision was solely

¹ *Rutan v. Hinchman*, 30 N. J. L. 255 (1863).

² *Smith v. Smith*, 28 N. J. L. 208 (1860).

³ 2 Denio, 90 (1846).

⁴ 14 Barb. 90 (1852).

⁵ See also *Bartlett v. Wheeler*, 44 Barb. 162 (1864); *Weir v. Hill*, 2 Lans. 281 (1876).

⁶ 9 Allen, 8 (1864).

upon the Statute of Frauds, and the effect, or non-effect of complete performance by the other party to the contract. Chief Justice Bigelow, in one of his ablest opinions, sustained the defense in these words: "The literal and obvious meaning of the words of the statute is clear and unambiguous. The provision is, in substance, that verbal evidence shall be insufficient to support an action on an agreement which is not to be performed within a year. In making this explicit enactment the legislature must be understood to have used the word "agreement" in no unusual or extraordinary sense. In the absence of any explanatory or qualifying words, it must be interpreted according to the common and approved usage of the language, unless it has some peculiar and appropriate meaning in the law. For the purpose of this case it is not material to determine whether it has any special and technical signification, such as is sometimes attributed to it. In whichever sense it is understood—whether it is to be interpreted as signifying a mutual contract, and as intended to include the stipulations of both parties, which is its strict legal meaning, as was held in *Wain v. Warlters*,¹ or as a promise or undertaking by one party only, of a purely unilateral character, which is the meaning given to it by this court in *Packard v. Richardson*,² the requirement is, that it is to be in writing. If the former is its correct interpretation, then the true construction of the provision is that the stipulations of both parties must be in writing, unless the promise of each is to be fulfilled within the year; that is, the entire agreement, comprehending all that is to be performed by either party, must be supported by written evidence. It is immaterial that performance by one party of his part of the contract is to be complete within the prescribed period. It is none the less on that account a part of the original agreement. Nor can it be properly said than an agreement, if the word is used as applicable to the subject-matter of a contract consisting of mutual obligations, is performed within a year, when it has been fulfilled by one side only; such a conclusion would seem to involve the absurdity expressed in the language of a learned judge: "It cannot be said that an agreement is performed when a great part of it remains unperformed; in other words, that part performance is performance." In the sense, then, of a mutual contract, importing reciprocity of obligation by which two parties are bound, an agreement is required to be in writing, if the undertaking of either party is not to be fulfilled within the year. But in the most restricted

¹ 5 East. 10.

² 17 Mass. 122, 131.

meaning of the word, as signifying the promise or contract of one party only, it would seem to be equally clear that it would apply to and include every stipulation, the performance of which is to be postponed beyond the expiration of a year. So far as agreement is to be executed within the year, this statute could have no application to it.

In either view, therefore, of which the meaning of the word "agreement" is susceptible, whether it is construed to mean the stipulations of both parties, and to include those which have been performed as well as those which are future and executory, or whether it is interpreted as comprehending the latter only, the statute embraces both classes, and applies with equal force to a contract where the consideration has been executed fully by one of the parties, and one where the whole promise is executory.

The real difficulty with the construction for which the plaintiff contends is, that it virtually ingrafts a distinct provision on the statute, which the legislature seems studiously to have omitted. The express requirement is, that no action shall be brought on agreements which are not to be performed within a year, unless they are supported by written proof; to this must be added, by the mere force of judicial construction, according to the plaintiff's theory of interpretation, a further provision, by which all agreements are taken out of the operation of the statute, if they have been in part performed by one of the parties within the prescribed period. But no such implication necessarily arises out of the terms of the statute, or is involved in its operation, in order to adapt it to the ordinary business and practical concerns of life. We are at a loss, therefore, to understand how such a construction can be reconciled with any sound rule of judicial exposition. Nor is it to be overlooked, in this connection, that in the original Statute of Frauds, which contained the provision in question, there is another enactment still retained as part of the statute—that relating to contracts for the sale of goods above a certain amount—which expressly provides that part performance, as well as written evidence of the bargain, shall be sufficient to render it valid. The inference is very strong that if the legislature had intended to apply the same rule to agreements which were not to be performed within a year, they would in like manner have so enacted in terms, and not left so important an element in the legal validity of contracts to be deduced by doubtful implication.

The view which we have taken of the true consideration of the statute is greatly fortified by a consideration of the purpose which the Statute of Frauds was designed to accomplish, and the mischief which

it was intended to prevent. The great object of the enactment was, that contracts of an important character, as well as those which were not to be executed within a prescribed period, should be supported by more certain and satisfactory evidence than could be afforded by verbal testimony only. The danger of fraud and perjury, and the risk of mistakes arising from the defective and imperfect recollection of witnesses, were the evils against which the provisions of the statute were directed. The special object of the clause which provides that written evidence of a contract not to be performed within a year shall be necessary to support an action was, to prevent the proof of verbal agreements when, from the lapse of time, witnesses might not be able to recollect their precise terms.¹ It is difficult to see why all the reasons of policy and expediency to which the statute owes its origin do not apply with equal force to an agreement, only one part of which is not to be performed within the year, as to a contract, the whole of which is executory, and is not intended to be performed by either party till after the year is past. The consideration or counter stipulation for that part of an agreement which has been executed may often be the most complicated part of a contract, the details of which it may be difficult to retain in memory; and, if the payment or performance of it is postponed until after the expiration of a year, the danger of mistake or perjury in attempting to establish it by parol evidence would be none the less, because the agreement has been fully executed by the other party. Evidence of the fact that land had been conveyed or goods delivered, or that a promissory note had been given, or proof of the existence of any other executed consideration, would have but little if any tendency to show the nature of the executory stipulations on the faith of which such part performance had been made. If these are left to be made out by verbal evidence only, it is obvious that a wide door would be left open for the very evils which the statute was designed to prevent. If the statute includes only agreements where the mutual promises are not intended to be performed within a year, a large class of contracts would be left without any limitation as to the time within which they might be susceptible of being established by parol proof. Any future executory stipulations, however numerous or complex, the consideration of which was executed at the time an alleged agreement was entered into, might be proved by the testimony of witnesses, founded on their unaided recollections, although their per-

¹ *Lapham v. Whipple*, 8 Met. 59.

formance was postponed for a period of time, however long. If, for example, the contract set out in the plaintiff's declaration can be proved without any written evidence, then a similar contract could be established by the same species of evidence, although the payment of the consideration for the conveyance of land was not to be made for ten or twenty years. A construction of the statute which leads to such conclusion seems to us not only to be contrary to the terms of the enactment, but to be subversive of the beneficial objects for which it was adopted."

In 1855 the subject was carefully considered in the case of *Pierce v. Paine*,¹ where the plaintiff agreed to subscribe and pay for some railroad stock, and if "after one year" he did not wish to keep it, the defendant agreed to take it and pay the plaintiff the amount he had paid out and interest thereon. The plaintiff subscribed and paid for the stock within a year and took the certificate in his own name, but the defendant (apparently) declined to take it off his hands and refused to pay for it. It was held that the plaintiff could not recover upon the express contract, as it was oral, nor in any form, since the defendant never received any benefit from the bargain. *Donellan v. Read* was cited and disapproved.² So in *Emery v. Smith*³ *Donellan v. Read* was not approved. It was an action to recover for the balance due for two years' service, where the defendant had agreed to pay \$100 for the first year and \$200 for the second. The court held that, notwithstanding the plaintiff had fully performed his side of the contract, he could not recover on the special contract itself, nor even use the contract to absolutely "fix" the damages, on a *quantum meruit*; the plaintiff could recover only the fair value of the services.⁴

This subject was also carefully examined in *McElroy v. Ludlum*,⁵ in which it was said that performance of a contract invalid by the Statute of Frauds will not validate the contract itself. This was applied to a verbal contract to employ the plaintiff for a year from a future day, and the service had been fully performed, but it was held that no action would lie on the contract itself for the stipulated wages, but only on a *quantum meruit*.⁶

¹ 28 Vt. 34.

² And see *Meek v. Gass*, 2 Russ. & Ch. (Nova Scotia) 247, approving *Pierce v. Paine*.

³ 46 N. H. 151 (1865).

⁴ And see *Ham v. Goodrich*, 37 N. H. 186, on the last point.

⁵ 32 N. J. Eq. 828 (1880).

⁶ See also *Whipple v. Parker*, 29 Mich. 374 (1894), approving *Pierce v. Paine* and disapproving *Donellan v. Read*; *Kleeman v. Collins*, 9 Bush, 461; *Warner v. Texas & Pacific R. R. Co.*, 54 Fed. Rep. 922, favor the same view.

Of course if *complete* performance by the plaintiff does not make a defendant liable on his oral contract, a partial performance would not. And therefore a person orally employed for more than a year cannot recover damages for his dismissal, although he had rendered six months' service before that event.¹

3. As to partial performance by the *defendant*.

If the defendant's part unperformed was clearly not to be done within a year, he is not liable on his oral promise for that part, merely because he has performed the first part within a year. Therefore in such cases no action lies upon the latter part of the promise, which clearly extended beyond a year, merely because the first part which was to be performed in a year had been actually performed. *Doydell v. Drummond*² is the leading case on this point. There the defendant had subscribed for a publication to be issued by the plaintiff in eighteen parts or numbers, one or two numbers to be issued each year, at three guineas a number, payable on the delivery of each number. The defendant received two numbers, and paid for them, and the plaintiff reserved the other numbers for him, as they were published during several successive years, which the defendant refused to take or pay for. In a suit for the price of the last sixteen numbers, the court held the contract within the statute since the defendant's promise to pay for the last numbers was clearly not to be performed within a year, whether the plaintiff could or could not have possibly published the whole eighteen numbers within a year from the subscription, and although there had been part performance on both sides within the year. In *Foote v. Emerson*³ the verbal contract was to pay \$150 per year for three years, and part was paid, and it was held the balance could not be collected; for when part of the contract is to be performed in a year and part not, the whole is void. In *Parks v. Francis*⁴ the defendant promised to deposit \$100 in the bank, in the name of an infant named for him, in four equal annual installments. He made two deposits of \$25 each, and in a suit for the last two installments the contract was held within the statute.⁵

Does not reason and principle on this subject justify the statement that if the *defendant's* promise be oral, and clearly not to be performed

¹ *Scoggan v. Blackwell*, 36 Ala. 351; *Baker v. Coddling*, 18 N. Y. Supplement, 159 (1892); *Reinheimer v. Catter*, 41 Ohio St. 579 (1877); *Shumate v. Farlow*, 125 Ind. 359 (1890).

² 11 East, 155 (1809).

³ 10 Vt. 338 (1838).

⁴ 50 Vt. 626 (1878).

⁵ Similar decisions were made in *Atwood v. Fox*, 30 Mo. 499 (1880); and *Sharp v. Rhinel*, 55 Mo. 97 (1874); *Treadway v. Smith*, 56 Ala. 345 (1876).

on his part within a year, it is quite immaterial whether the *plaintiff's* promise was oral or written, or whether it was or was not to be performed within a year, or whether it has been partially, or even wholly, performed on his part. In either case the defendant is not liable on *such oral contract*, whether he may or may not be in some cases liable in some other form of action on a *quantum meruit*.

10. As to recovery on a *quantum meruit*.

Although a contract is invalid under the Statute of Frauds, it does not follow that no remedy exists for anything done under it. By no means. The laborer who performs work under such a contract, though he cannot recover on the special contract itself, may, nevertheless, obtain just remuneration upon a count for work and labor done, simply because he has voluntarily furnished, and the other party has voluntarily accepted, a valuable consideration, both expecting it to be paid for; and that is always sufficient to create an implied contract, to which the Statute of Frauds never applies. Any other rule would promote, rather than prevent, fraud. The same rule applies to goods sold and delivered; to land conveyed; to money lent, etc.¹

The great controversy in such case is whether in actions on a *quantum meruit* or *quantum valebant*, the contract price is to govern, or whether it is entirely an open question, as if no special contract had ever been made. Some courts seem to hold that, although such contracts do not bind the laborer to work the stipulated time, yet that even in suits on a *quantum meruit* for the labor actually performed, they do govern the time and amount of compensation.²

But it is difficult to see how one provision of such a contract is more binding than another. To be sure the price stipulated in the contract may be some evidence on a *quantum meruit*, as the laborer's admission of what his work was really worth; sufficient to be the basis of recovery in the absence of other evidence on the subject; but if contradictory evidence be offered on this point it seems that the contract price

¹ See *Shute v. Dorr*, 5 Wend. 204 (1830), labor performed; *Mayor v. Pyne*, 2 C. & P. 91; 3 Bing. (1825) 285; *Holbrook v. Armstrong*, 10 Me. 31 (1833), goods sold. *Towsley v. Moore*, 30 Ohio St. 185 (1876), for labor, where the subject is exhaustively considered; *Baker v. Lauterbach*, 68 Md. 64 (1887); *EcElroy v. Ludlum*, 32 N. J. Eq. 829 (1867); *Kimmins v. Oldham*, 27 W. Va. 258 (1885); *Grant v. Grant*, 63 Conn. 343 (1898); *Fisher v. Wilson*, 18 Ind. 133 (1873); *Montague v. Garnett*, 3 Bush, 297 (1867), a

loan of money; *Swift v. Swift*, 46 Cal. 266 (1873), similar; *Walke v. Fleming*, 103 Ind. 105 (1885), land conveyed to defendant. See also *Pulbrook v. Lawes*, 1 Q. B. Div. 284 (1876); *Kleeman v. Collins*, 9 Bush, 461 (1872).

² See *Clark v. Terry*, 25 Conn. 395; *Swansey v. Moore*, 22 Ill. 63; *La Du-King Co. v. La Du*, 36 Minn. 473; *Kruger v. Lepfel*, 42 Minn. 6; *Van Valkenburg v. Crofut*, 15 Hun, 149 (1878); *Smart v. Smart*, 24 Hun, 127 (1881).

ought not to be an absolute bar to an inquiry as to the real value, for the action itself is on a "*quantum meruit*." And the preponderance of opinion, and of reason, is decidedly the other way; that is, that the contract price does not absolutely fix the rate of compensation, as a matter of contract, though it may be admissible as an admission by the parties of the real value of the consideration.¹ So as to goods sold and delivered; if goods are sold on a long credit the price is ordinarily higher than if sold for cash, and to allow the seller to disregard the *time* element because it was oral, and still enforce the *price* element which was equally oral, would be doing injustice to the buyer. But to allow the contract price to be admitted as *some evidence*, but not conclusive, of the value, would be doing exact justice to both parties.

Wherever, therefore, the defendant has received and enjoyed a valuable consideration furnished by the plaintiff, substantial justice can generally be done without doing violence to the plain language of the statute.

In preparing this article the writer has been much aided by Mr. Browne's valuable chapter on the subject, and, although sometimes unable to agree with his conclusions, it is with the unfeigned respect due to one acknowledged to be a standard authority upon the Statute of Frauds.

EDMUND H. BENNETT.

Boston, August 1, 1895.

¹ *Emery v. Smith*, 46 N. H. 151 (18—); *Erben v. Lorillard*, 19 N. Y. 299 (1859); *Hertzog v. Hertzog*, 34 Pa. St. 418 (1859), where the subject is exhaustively examined; *McElroy v. Ludlum*, 32 N. J. Eq. 829 (1880); *Faller v. Reid*, 38 Cal. 100 (1869);

Fish v. Sherman, 25 Barb. 433 (1857); *William Butcher Steel Works v. Atkinson*, 68 Ill. 421 (1893). And see *Clark v. Gilbert*, 32 Barb. 584, Allen, J.; *Jeffery v. Walker*, 72 Hun, 622 (1893).